IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LANCE VALENTINO DAVIS, Appellant.	No. 37428-5-II UNPUBLISHED OPINION

Houghton, J. — Lance "Tino" Davis appeals his convictions of four counts of second degree assault with firearm enhancements and one count of unlawful possession of a firearm. He argues that the prosecutor improperly commented on his right to silence during closing argument. We affirm.

FACTS

During the early hours of July 5, 2006, a fight broke out at a house party where Davis was a guest. Eventually, the fighting moved outside the home. Davis followed a group of women, who had participated in the fighting, as they retreated to a car parked near the party.

Some of those women saw Davis repeatedly pull up his shirt in a threatening fashion to display a gun held in his waistband. When the women got in the car and began to leave, Davis shot at them. One of the bullets grazed a woman in the car. Police officers later discovered five bullet holes in the car and a shattered windshield.

Police officers located Davis on October 20, 2006, after receiving a tip he was living with Le'Anita Brown. They surrounded the home and called Brown on her mobile phone. Davis answered but denied his identity and gave the phone to Brown. Brown followed the police instructions to take her small children and leave the home. Then, the police used a loudspeaker to talk to Davis, who eventually came out of the home after 10 to 15 minutes, and the officers arrested him.

The State charged Davis with second degree assault and unlawful possession of a firearm. A jury heard the matter.

During closing argument, the deputy prosecutor made the following statement:

> Then we get to other circumstantial issues. The defendant refused to cooperate with the investigation per his statement that he understood that Detective Benson wanted to talk to him, but he wasn't going to talk to him. He knew he was being looked for. He knew that Detective Benson wanted to talk to him. He was not going to cooperate. It's probably easy to understand why every single person in this case pled.[1] It's probably clear. You know, nobody wants to be implicated or involved in a case where someone's been shot. And at least in this crowd, nobody also wanted to help in case someone had been shot, called the police. That's not what this was about. This was about a shooting, and everybody get out of there and nobody talk. That's exactly what happened. So the only people law enforcement gets to talk to are the victims. That side, so to speak. But the defendant, when they got his name and got some information that led Detective Benson to locate him, at least over the phone through his family, he understood he wanted to talk to him and he said, "I'm not going to do it." Then he apparently fled the state. And I say "apparently," because all we know is what the defendant tells you, you know, that statement. He says he went to California to visit some friends and take some time away from, I guess, not only the heat of this, but Rhaczio's[2] murder, and maybe that's true. But it's what the defendant says. So apparently he left the state. He took considerable time to come out of the house when he knew that the police wanted him.

---

[1] "Pled" appears to be a scrivener's error for "fled." Report of Proceedings (Jan. 16, 2008) at 22.

[2] Davis's friend, Rhaczio Simms, was murdered in a separate incident two days after the events of this case.

Report of Proceedings (Jan. 16, 2008) (RP) at 22-23. Davis's counsel did not object at trial.

The jury convicted Davis of four counts of second degree assault with firearm enhancements and one count of second degree unlawful possession of a firearm. He appeals.

ANALYSIS

Davis contends that the prosecutor impermissibly commented on his right to silence and prejudiced the outcome of trial. The State responds that because Davis's counsel did not object at trial, he has waived any error unless the prosecutor's remarks were flagrant, ill intentioned, and incurably prejudicial.

Davis may raise an improper comment on his right to silence for the first time on appeal because the issue amounts to a manifest error affecting a constitutional right. *State v. Romero*, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002); RAP 2.5(a). However, because his trial counsel did not object, he has waived the issue unless the misconduct was "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'" *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006) (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)).

Comments on silence are either direct or indirect. *See Romero*, 113 Wn. App. at 790-91. Direct comments occur when a witness or prosecutor specifically references a defendant's right to silence. *State v. Curtis*, 110 Wn. App. 6, 9, 13, 37 P.3d 1274 (2002). Indirect comments occur when a witness or prosecutor mentions actions or statements made by the defendant that the jury could infer as an attempt to invoke the right to silence. *State v. Pottorff*, 138 Wn. App. 343, 347, 156 P.3d 955 (2007).

Davis avers that the comment in this case was indirect. Even if Davis is correct that this is an example of an indirect comment, he fails to show prejudice.

During the State's case, a police officer testified that he used a loudspeaker system to tell Davis to come out of the home, which he eventually did after 10 to 15 minutes. During the State's closing argument, the prosecutor referenced this when he said, "He took considerable time to come out of the house when he knew that the police wanted him." RP at 23.

Reviewing the prosecutor's statement in context, the record reveals that it was not flagrant or ill intentioned and did not result in an enduring prejudice. *Weber*, 159 Wn.2d at 270. Furthermore, Davis's counsel argued the same evidence in closing argument, undermining his claim of prejudice on appeal. *See State v. Russell*, 125 Wn.2d 24, 89, 882 P.2d 747 (1994). His argument fails.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

_____
Houghton, J.

We concur:

_____
Van Deren, C.J.

_____

Penoyar, J.